Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

October Term, 1971

MOTION FILED

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No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*,
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO., *et al.*,
Petitioners,

v.

LOUISIANA POWER & LIGHT CO., *et al.*,
Respondents.

MOTION OF THE BROOKLYN UNION GAS COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF PETITIONERS

BARBARA M. GUNTHER
JOSEPH P. STEVENS
CULLEN AND DYKMAN
177 Montague Street
Brooklyn, New York 11201
Attorneys for
The Brooklyn Union Gas Company

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MOTION OF THE BROOKLYN UNION GAS COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 42, The Brooklyn Union Gas Company (Brooklyn Union), respectfully moves for an order granting leave to file a brief *amicus curiae*

on the merits in support of the relief requested by the Petitioners in these cases and shows the following:

1. Written consent to the filing of a brief herein by Brooklyn Union was received from Petitioners, the Federal Power Commission (FPC), Pennzoil United, Inc., and United Gas Pipe Line Company (United), but was refused by Respondent Louisiana Power & Light Company (LP&L).

2. Brooklyn Union is a utility company engaged in the distribution of gas at retail, primarily to domestic customers, hospitals, schools and small businesses, in a service area encompassing approximately one-half of the City of New York. Some 4,000,000 persons are dependent upon this Company for gas for heating, cooking and other essential uses.

3. Brooklyn Union obtains its entire gas supply from three interstate pipeline companies whose facilities originate in the state of Louisiana or other southwestern areas. A substantial portion of this supply is purchased by Brooklyn Union from Texas Eastern Transmission Corporation (Texas Eastern), which, in turn, obtains a substantial portion of its gas supply, directly and indirectly, from United, the Petitioner in No. 71-1040. Texas Eastern, which is not a party to this case, is the largest resale customer of United, purchasing approximately 17% of all gas sold by that pipeline.

4. Movant (like Respondent LP&L) has contracts with its pipeline suppliers entitling it to delivery of certain fixed volumes of gas. However, because of curtailments by United to Texas Eastern, Texas Eastern for some time has not met the contract requirements of Brooklyn Union. As a direct result of the United and Texas Eastern curtailments (and curtailments by another supplier), Brooklyn

Union has been compelled to limit severely the availability of new gas service in its franchise area. In addition, Brooklyn Union's ability to continue to render safe and adequate service to its existing customers is under serious strain.

5. The Fifth Circuit has held that the FPC lacks jurisdiction under the Natural Gas Act to approve or adopt a systemwide curtailment program for an interstate pipeline unable to meet the contract requirements of its customers to assure the equitable apportionment of available gas supplies among *all* its customers, including direct industrial, as well as resale, customers. This decision permits Respondent, a direct customer of United, to seek judicial assistance to compel full contract deliveries to it in contravention of United's curtailment procedures.

6. Since it is physically impossible for a gas-deficient pipeline to make full contract deliveries to its direct customers without further curtailing its resale customers, the decision below subjects Brooklyn Union to additional substantial reductions in gas deliveries through United and other pipelines which have direct industrial customers. Any further significant reduction in pipeline deliveries to Brooklyn Union will make it impossible for Movant to maintain existing levels of service and will necessitate the reduction or discontinuance of gas service to present domestic and other ultimate gas consumers in New York City.

7. Although Brooklyn Union may seek the same or similar relief as that requested by the Petitioners, it has a direct and immediate interest in the case which is different from, and cannot adequately be represented by, any party. Unlike any of the parties, Brooklyn Union (a) is a resale customer of United (through Texas Eastern) and stands to lose substantial volumes of urgently needed gas to Respondent and other direct industrial customers of its pipeline suppliers, if the decision below is permitted to stand, (b) is a public utility required by statute

(N.Y. Public Service Law, Sec. 65 (McKinney 1955)) and its municipal franchises and consents to provide safe and adequate service, without discrimination, to gas consumers in its franchise area, and (c) is a gas distribution company, which "as a matter of ethics and good business * * * is required to protect its customers" and to participate as the representative of consumers in proceedings such as this, which directly affect their interests and welfare. *Pub. Serv. Comm'n. v. FPC*, 257 F. 2d 717, 720 (3d Cir. 1958), aff'd on other grounds *sub nom. Atlantic Rfg. Co.* v. *Pub. Serv. Comm'n.*, 360 U.S. 378 (1959).

8. Brooklyn Union believes that the following facts and questions of law, among others, are relevant to the Court's determination of whether the FPC has jurisdiction to regulate the equitable apportionment of insufficient natural gas supplies between direct industrial customers, and all other consumers served by resale customers, of an interstate pipeline company:

a. The impact of the decision below on ultimate consumers throughout the nation served by resale customers of gas-deficient interstate pipeline.

b. Whether state or local authorities can legally and practicably regulate in the disputed area. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20 (1961).

c. Whether a negative determination on federal regulatory jurisdiction would create a no-man's-land inconsistent with the intent of the Natural Gas Act "to create a comprehensive and effective regulatory scheme". *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Comm'n.*, 332 U.S. 507, 520 (1947).

9. Brooklyn Union submits that the foregoing relevant facts and questions cannot be adequately presented in a case in which none of the parties is a resale customer directly affected by the decision under review. If the present mo-

tion is granted, Brooklyn Union's brief *amicus curiae* will be addressed to these issues.

WHEREFORE, Brooklyn Union requests leave to file a brief *amicus curiae* in this proceeding.

Respectfully submitted,

/s/ BARBARA M. GUNTHER

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BRIEF OF *AMICUS CURIAE* THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF PETITIONERS

Interest of *Amicus Curiae*

The interest of Brooklyn Union in this case is set forth in its motion (bound herewith) for leave to file a brief *amicus curiae* as follows:

[Brooklyn Union] is a utility company engaged in the distribution of gas at retail, primarily to domestic customers, hospitals, schools and small businesses, in a service area encompassing approximately one-half of the City of New York. Some 4,000,000 persons are dependent upon this Company for gas for heating, cooking and other essential uses.

[Brooklyn Union] obtains its entire gas supply from three interstate pipeline companies whose facilities originate in the state of Louisiana or other southwestern areas. A substantial portion of this supply is purchased by Brooklyn Union from Texas Eastern Transmission Corporation (Texas Eastern), which, in turn, obtains a substantial portion of its gas supply, directly and indirectly, from United, the Petitioner in No. 71-1040. Texas Eastern, which is not a party to this case, is the largest resale customer of United, purchasing approximately 17% of all gas sold by that pipeline.

[Brooklyn Union] (like Respondent LP&L) has contracts with its pipeline suppliers entitling it to delivery of certain fixed volumes of gas. However, because of curtailments by United to Texas Eastern, Texas Eastern for some time has not met the contract requirements of Brooklyn Union. As a direct result of the United and Texas Eastern curtailments (and curtailments by another supplier), Brooklyn Union has been compelled to limit severely the availability of new gas service in its franchise area. In addition, Brooklyn Union's ability to continue to render safe and adequate service to its existing customers is under serious strain.

The Fifth Circuit has held that the FPC lacks jurisdiction under the Natural Gas Act to approve or adopt a systemwide curtailment program for an interstate pipeline unable to meet the contract requirements of its customers to assure the equitable apportionment

of available gas supplies among *all* its customers, including direct industrial, as well as resale, customers. This decision permits Respondent, a direct customer of United, to seek judicial assistance to compel full contract deliveries to it in contravention of United's curtailment procedures.

Since it is physically impossible for a gas-deficient pipeline to make full contract deliveries to its direct customers without further curtailing its resale customers, the decision below subjects Brooklyn Union to additional substantial reductions in gas deliveries through United and other pipelines which have direct industrial customers. Any further significant reduction in pipeline deliveries to Brooklyn Union will make it impossible for Movant to maintain existing levels of service and will necessitate the reduction or discontinuance of gas service to present domestic and other ultimate gas consumers in New York City.

ARGUMENT

I

The Fifth Circuit erred in finding that the FPC lacks jurisdiction over systemwide pipeline curtailment programs.

The decision of the Fifth Circuit, holding that the FPC lacks jurisdiction to approve or order pipeline curtailment programs on a systemwide basis to direct industrial, as well as to resale customers, is inconsistent with the holdings and reasoning of prior decisions by this Court and by other Federal courts. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961); *Panhandle Eastern Pipe Line Co.*, v. *Pub. Serv. Comm'n.*, 332 U.S. 507 (1947); *Michigan Con-*

sol. Gas Co. v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir. 1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 177 F. 2d 942 (6th Cir. 1949).

These decisions all indicate that, by virtue of its broad jurisdiction over the interstate transportation of gas by pipeline, the FPC has regulatory authority over the system-wide disposition of limited natural gas supplies, even though it may lack continuing power over the rate aspects of pipelines' direct sales. We believe these decisions will be fully briefed by the Petitioners, and therefore limit our argument on this aspect of the case to an analysis of the basic rationale employed in judicially construing Natural Gas Act provisions concerning the scope of FPC jurisdiction.

This basic rationale, which has been emphasized time and time again by this Court and which was ignored by the Fifth Circuit, is that the Natural Gas Act was intended by Congress to be a remedial statute, and must therefore be broadly construed where necessary to accomplish its purpose of affording a complete and effective bond of regulation of the natural gas industry for the benefit of ultimate consumers. 332 U.S. 507, 520.

This legislative intent has caused this Court to measure the FPC's jurisdiction as follows: "* * * in a borderline case where congressional authority is not explicit, we ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." 365 U.S. 1, 19-20.

The intent of Congress in enacting the Natural Gas Act is no longer subject to debate. Faced with numerous

judicial determinations by this and other Courts which emphasized the inability of state and local authorities to effectively protect the public interest through regulation of the interstate aspects of the natural gas industry, Congress acted to create a national agency with power to regulate "* * * particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 503 (1949).

A most significant determination in the context of this case is *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), in which the Court held that an attempt by state authorities to interfere with the flow of natural gas in interstate commerce, or to allocate gas being transported by pipelines in interstate commerce to resale *and* direct sale customers, was prohibited by the Commerce Clause of the United States Constitution. It was found that such action, "* * * which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference [citing several cases]." 262 U.S. 553, 596-97. See also *Illinois Natural Gas Co.* v. *Pub. Serv. Co.*, 314 U.S. 498 (1942); cf. *Pennsylvania Gas Co.* v. *Pub. Serv. Comm'n.*, 252 U.S. 23 (1920) (state *rate regulation* of local retail sales of interstate pipeline not violative of the commerce clause). The decision in *Pennsylvania* v. *West Virginia* was known to Congress when the Natural Gas Act became law, and, though rendered many years ago, dealt with issues almost identical to those presented herein.

Apart from the constitutional impediment, there is no area in which state authorities are more ill-equipped or

have less incentive to protect the interests of ultimate gas consumers in the several states than the area of equitable distribution of the limited gas supplies of a curtailing pipeline.[1] There is no better example than the present controversy of the inequity and futility of attempting to deal with such problems in local forums.

Here, a proceeding had been instituted and was in progress before the FPC to determine the lawfulness of United's curtailment program, based on the standards set forth in the Natural Gas Act and an analysis of the various markets affected by United's curtailment. Brooklyn Union, LP&L, and many other United customers were parties to this proceeding and had full opportunity to present evidence before that single forum to support their views on the propriety of United's program and alternatives thereto.

While that proceeding was in progress and without notice to other interested parties, the Respondent, a direct sale customer of United, brought the present action in a District Court in Louisiana to enjoin United from curtailing any contract deliveries to it. Neither that court nor the Fifth Circuit was equipped to make the type of analysis required to insure protection of the public interest under the circumstances. Nor can it be said that state authorities are in any better position to deal with such matters.

When this very problem was brought to the attention of this Court, it held, consistently with its decision in *Penn-*

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1. A similar inability of local authorities to deal with problems of conservation of natural gas resources for beneficial end uses led the Court to find that the FPC had authority to consider such matters in connection with pipeline transportation of gas. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 20-22 (1961).

sylvania v. *West Virginia* and the legislative intent embodied in the Natural Gas Act, that curtailment of service to direct sale customers is a matter "largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission * * *." *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Comm'n.*, 332 U.S. 507, 523 (1947); see also *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 790 (6th Cir. 1949). That statement is sound, reasonable, and consistent with the basic rationale consistently employed in determining the scope of FPC jurisdiction under the Natural Gas Act. That conclusion clearly requires reversal of the Fifth Circuit's contrary determination as to FPC jurisdiction over interstate pipeline curtailments in this case.

II

The Fifth Circuit erred in reversing the District Court's dismissal of LP&L's claim for specific performance.

The controversy before the Court arises from an action for *specific relief* brought in a Louisiana District Court by LP&L against United and United's parent, Pennzoil United, Inc. LP&L seeks an injunction to prevent United and Pennzoil from curtailing gas deliveries to two of LP&L's generating stations (R. 1-16).[2] LP&L's complaint does not seek *damages* for breach of its gas purchase contract by United; the Fifth Circuit did not consider that remedy; and the case was not remanded to the District Court for consideration of that remedy.

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2. This reference is to the Record Appendix in the Fifth Circuit.

Accordingly, no issues are before the Court in this case concerning the damage remedy, as distinguished from the remedy of specific performance. The two remedies are distinct, and involve different questions of fact, law, public policy and the extent of the FPC's power to confer immunity on curtailing pipelines against *financial* responsibility for breach of contract. *Cf. Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir. 1949) and *Panhandle Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 177 F. 2d 942 (6th Cir. 1949) with *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F. 2d 60 (6th Cir. 1955), *cert. den.* 350 U.S. 987 (1956).

These decisions of the Sixth Circuit hold that an FPC approved curtailment plan is a complete defense to a collateral claim for injunctive relief from curtailments effected pursuant to such plan. This sound principle follows necessarily from the conclusion that the FPC has jurisdiction to allocate gas supplies among direct and resale customers. Thus, the Fifth Circuit erred in reversing the District Court's dismissal of LP&L's request for specific relief.

III

The Fifth Circuit erred in declining to dismiss the District Court action for failure to require the joinder of indispensable parties.

The factual predicate for this case is a very simple and practical one. For whatever reasons, excusable or otherwise, United cannot meet its full contract obligations to all customers. Accordingly, if United is required to meet its

full contract commitments to one customer or class of customers, it must further reduce deliveries to other customers.

If, as the Fifth Circuit has held, the FPC lacks jurisdiction to order, approve, or modify pipeline curtailments on a systemwide basis, apparently the only forum for adjudication of the respective entitlements of all United's customers to its limited supply of gas is the Federal District Court in which LP&L's action for specific performance is pending. None of United's customers (other than LP&L) are parties to that action.

It is clear that the grant of the relief sought by LP&L would significantly impair the rights of other customers of United by further reducing the pipeline's ability to meet their requirements. Moreover, a failure to join all affected customers could well expose United to multiple litigation and inconsistent obligations to deliver gas. Finally, it is clear that the final judgment herein cannot be conditioned or shaped to avoid prejudice to these absent customers. Accordingly, we submit that these customers are indispensable parties, under the tests set forth by this Court in *Shields* v. *Barrow*, 58 U.S. (17 How.) 129 (1854) and codified in Rule 19 of the Federal Rules of Civil Procedure (28 U.S.C., Rule 19).[3]

It is important to note that LP&L's claim is not made in an action brought by the FPC to protect the public interest, but is rather an attempt by that litigant to enforce its pri-

3. This Court has an obligation to require joinder of indispensable parties or dismiss the action, even if the issue of joinder was not raised at the trial level. *Hoe* v. *Wilson*, 76 U.S. (9 Wall.) 501 (1869); *Haby* v. *Stanolind Oil and Gas Co.*, 225 F.2d 723 (5th Cir. 1955), decision on the merits reported at 228 F.2d 248.

vate rights to United's limited gas supply. Since the determination of LP&L's rights in the District Court would necessarily affects the rights of all other customers of United to that common source of supply, the rationale of *Commonwealth Trust Co.* v. *Smith*, 266 U.S. 152 (1924), requires reversal of the Fifth Circuit's decision. See also *California* v. *Southern Pac. Co.*, 157 U.S. 229 (1895); cf. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 364 (1940).

Moreover, the absence of indispensable and necessary parties to this case is but another indication of the valid and persuasive public interest considerations requiring authority in a single federal agency equipped to deal with interstate pipeline curtailments to both direct and resale customers.

IV

The Fifth Circuit erred in prematurely and erroneously adjudicating the jurisdictional status of United's "Green System".

As to the jurisdictional status of the so-called "Green System" of United, we rely upon the decisions of this Court in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945) and *FPC* v. *Florida Power & Light Co.*, 40 U.S.L.W. 4141 (Jan. 12, 1972), each of which appear to require reversal of the Fifth Circuit's determination on this aspect of the case.

The "de minimus" basis for determinations of this kind has not only been rejected by this Court, but is also factually incorrect, as indicated by the FPC's Opinion 610. United Pet., App. F, pp. 97a-106a. This factual error

illustrates the most cogent reason for the judiciary to defer to the FPC in such determinations. In the words of this Court:

> Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact. 40 U.S.L.W. 4141, 4144.

When confronted with a similar invitation to dispense with FPC expertise and pre-determine a factual issue under consideration by that agency, the Sixth Circuit wisely and correctly deferred to the FPC, stating:

> Such determination must, it seems, be made by those entrusted with supervision and regulation rather than by courts, and even were we to conclude that the district court has jurisdiction to grant the relief here prayed, there would remain the question whether its exercise would be appropriate. It would impair public confidence in courts, if a decree directing the construction sought at Edgerton could be nullified by a determination of the Commission that undue preference or prejudice would result from such construction, or conversely, confidence in and the efficiency of the Commission would be destroyed if its determination became a nullity by reason of the overriding authority of court decree.
>
> *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789 (6th Cir. 1949).

We also believe it appropriate in this respect to defer to the FPC's views on the primacy of its own jurisdiction, and do so here, though we submit that the foregoing considerations alone require reversal of the Fifth Circuit decision on the jurisdictional status of the "Green System".

CONCLUSION

For the foregoing reasons, we ask the Court to reverse the decision of the Fifth Circuit and dismiss the complaint of Louisiana Power & Light Company herein.

Respectfully submitted,

BARBARA M. GUNTHER
JOSEPH P. STEVENS
CULLEN AND DYKMAN
177 Montague Street
Brooklyn, New York 11201
Attorneys for
The Brooklyn Union Gas Company

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